No. 3955

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

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G. TRAVERSI,

*Plaintiff in Error,*

vs.

UNITED STATES OF AMERICA,

*Defendant in Error.*

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# BRIEF FOR DEFENDANT IN ERROR

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### I

### STATEMENT OF THE CASE

This is a writ of error to the District Court of the United States for the Northern District of California, Northern Division, to reverse the sentence of conviction of plaintiff in error upon two counts of an information charging him with violations of the "National Prohibition Act."

In the first count of the information it was charged that plaintiff in error,

"On or about the 5th day of April, 1922, at 115 I St., Sacramento, in the County of Sacramento, in the Northern Division of the Northern District of California, and within the jurisdiction of this court then and there being, did then and (2) there wilfully and unlawfully maintain a common nuisance in that the said defendants did then and there wilfully and unlawfully keep for sale on the premises 115 I St. aforesaid, certain intoxicating liquor, to wit: 1 qt. bottle one-third full *full* of red wine then and there containing one-half of one percent or more of alcohol by volume which was then and there fit for use for beverage purposes.

That the keeping for sale of the said intoxicating liquor by the said defendants at the time and place aforesaid, was then and there prohibited, unlawful and in violation of Section 21 of Title II of the Act of Congress of October 28, 1919, to wit, the National Prohibition Act".

In the second count, the plaintiff in error was charged with the unlawful possession of intoxicating liquor.

The jury having found the defendant guilty on both counts, he was on October 13, 1922, sentenced to pay a fine of $500 and be imprisoned for three months in the County Jail of Sacramento County, and in the event of default in such payment, that he be imprisoned for the further period of five months, the terms to run consecutively.

At the trial it was shown that DeSpain, a Federal

Prohibition Agent, on April 5, 1922, visited the premises at No. 115 "I" Street in Sacramento; that he saw one Taro back of the bar in his shirt sleeves, serving two patrons with beer. Taro was informed that witness was a Federal Prohibition Agent and directed to step out from behind the bar; he did so and commenced fighting with the agents. At that time plaintiff in error came through a door into the bar room with a bottle of wine in his hands which witness took from him and turned it over to another agent. At the same time there were four or five people in the premises. They were all up to the bar and were drunk, which they displayed by staggering. (Tr. pp. 24 and 25). Witness Greer testified that he was a Federal Prohibition Officer familiar with the premises at No. 115 "I" Street, Sacramento; that it is an old fashioned saloon premises; that he visited the premises on April 5, 1922, with witnesses DeSpain and Agent Rinckel; that he saw Taro waiting on the bar with his coat off; saw a scuffle between Taro and officers; saw plaintiff in error coming through a door at the end of the bar, into behind the bar; that he had a bottle of wine which DeSpain took away from him and that there was red wine in the bottle which contained more than one-half of one per cent or more of alcohol by volume. (Tr. pp. 26 and 27). When defendant in error testified he advanced the claim that he had taken the wine, but that he got it to take lunch and when he reached the door the man grabbed him; that the incident occurred maybe 3:30 or 4:00

o'clock in the afternoon. (Tr. pp. 30 and 31). The plaintiff in error also testified: (Tr. p. 32) "Q. Were you tending bar? A. Yes, when I come at that time; when I came in with the bottle I was tending bar." He further said that one Boizoni was running the bar when he was not there; that at the time Federal Agents came in "I was tending bar myself."

The plaintiff in error now urges before this Court

a. That the second count of the information is insufficient to state an offense or sustain a conviction.

b. That the evidence is insufficient to sustain the conviction on the first count of the information.

c. That court erred to the prejudice of plaintiff in its instructions to the jury and four points in respect to the charge are specified as erroneous.

It may be noted that the point of the insufficiency of the evidence to sustain the conviction on the first count is not raised in the assignment of errors filed by the plaintiff in error.

The plaintiff in error did not object to any testimony or take any exceptions at the time of the trial. He did not move for an instructed verdict at the close of the testimony or at all. He did not take any exceptions to any portion of the Judge's charge. On the contrary, during the charge when the court asked if there was anything else that counsel would like

to ask, Mr. Gray, counsel for plaintiff in error, answered "no." There is a document certified as a bill of exceptions which does not contain any objections or exceptions. The trial court in that behalf added his certificate that "there were no objections or exceptions of any character taken or reserved at the trial either to evidence or the charge of the Court; but I have, at the earnest request of counsel for the defendant consented to certify the record to the end that a review may be had of any question which may be deemed to arise thereon. (Tr. p. 38).

## II

## ARGUMENT

### A. THE SECOND COUNT OF THE INFORMATION WAS NOT INSUFFICIENT. IT PROPERLY CHARGED UNLAWFUL POSSESSION; BUT IT IS NOT MATERIAL TO DETERMINE ITS SUFFICIENCY HERE.

The second count of the information charges unlawful possession of intoxicating liquor according to approved forms. Such possession was prohibited by Section 3 of Title II of the "National Prohibition Act." The punishment therefor was declared in Section 29 of the same Title, and it is provided in Section 32 of the same Title that it shall not be necessary to include in the information any defensive negative averments, but that it shall be sufficient to state that the act complained of was then and

there *prohibited* and *unlawful*. The pleading thus measures up to the requirements of the Statute and is sufficient upon the authority of

YOUNG vs. UNITED STATES, 272 Fed. 967.

The formula made use of by the pleader is authorized by Section 32 of Title II of the Act quoted, and that this provision is entirely valid has been decided in the case of

FYKE vs. UNITED STATES, 254 Fed. 225.

This case was cited with approval upon the same point by this Court in the case of

CABIALE vs. UNITED STATES, 276 Fed. 769.

The Cabiale case is also an authority in support of the pleading here questioned.

But the sufficiency of the second count of the information is not here material. The sentence of imprisonment necessarily rests upon the first count. And the first count is entirely sufficient to sustain the sentence. In fact the plaintiff in error does not question in his assignments of error or in his brief that the first count of the information was sufficient. Since the sentence is sustained by the first count any questions respecting the other count are immaterial.

CLAASEN vs. UNITED STATES, 142 U.S. 140,35 L. Ed. 966;

DOE vs. UNITED STATES, 253 Fed. 903, 904.

## B. THE EVIDENCE WAS AMPLY SUFFICIENT TO JUSTIFY THE VERDICT ON THE FIRST COUNT, BUT THE POINT CANNOT BE RAISED BY THE PLAINTIFF IN ERROR.

The evidence clearly authorized the jury to find that the defendant kept wine for sale at the premises in question. The place was shown to be an old fashioned saloon premises, and was being conducted by plaintiff in error. About the middle of the afternoon of April 5, 1922, three Federal Prohibition Officers entered; they found one man with his coat off behind the bar serving customers; they found three or four people all up to the bar and drunk and staggering. About that time the defendant came through a doorway with the bottle of wine in question in his hands. He admits that when he came in with the bottle he was tending bar. (Tr. p. 32). Greer stated that he saw plaintiff in error "coming through the door at the end of the bar; into behind the bar." (Tr. p. 26). There is thus shown to the jury the not unfamiliar situation of a place fixed up as an "old fashioned saloon" conducted by defendant, customers lined up to the bar and drunk and staggering and being served with something, when the defendant, apparently ignorant of the entry of the officers, came through a door and into behind the bar with supply of intoxicating liquor. These facts are not even denied, although defendant testified. The jury would have stultified themselves had they not found that the liquor in question was

there for the purpose of being sold to the drunken customers. The defendant's argument proceeds entirely upon the proposition that the jury were compelled to accept his statement that instead of intending to sell the liquor, which would have been a crime, he intended to transport it elsewhere to use it for lunch, which would also have been a crime. Considering the situation, and the fact that the alleged going out for lunch was in the middle of the afternoon at a time when he admitted he was tending bar, the jury were not obliged to accept his statement that he was taking the liquor out for his lunch, and did not intend to sell it.

We submit these observations as to the sufficiency of the evidence, but we insist that the question of the sufficiency of the evidence does not arise for the reason that not only was this question not raised by the assignment of errors, but it also appears that defendant did not move for a directed verdict at any time during the trial. In such case he is not entitled to question the sufficiency of the evidence.

CLARK vs. UNITED STATES, 245 Fed. 112.

There can be no reasonable contention that the case presents such threatneed miscarriage of justice that the Court can ignore these salutary rules. Indeed, at the time of the settlement of the bill of exceptions it could not have been known from any record that the question of the sufficiency of the evidence would be urged. It was the duty of the Court to eliminate extraneous matter from the bill,

and while the record in the instant case is probably complete, yet the possibility of abuse would be serious if the Court were as a rule to ignore the salutary doctrine declared in such cases as the Clark case, and review the testimony when up to the time of the settlement of the bill of exceptions there had been no point made as to the sufficiency of the evidence.

The evidence was clearly sufficient, but if any possible strictures could be taken to it, still there is not presented a case of a plain violation of defendant's rights.

C. THE CHARGE OF THE COURT WAS CORRECT. PLAINTIFF IN ERROR DID NOT TAKE ANY EXCEPTIONS THERETO, NOR DID HE REQUEST ANY FULLER CHARGE.

Although plaintiff in error did not except to the charge of the Court, nor did he request any instructions whatever upon collateral points or at all, and his counsel affirmatively declared that he had nothing that he cared to ask, (Tr. p. 35), certain strictures are now taken to a portion of the charge.

At the beginning of the charge the Court properly stated to the jury that the first count of the information charged defendants with maintaining a common nuisance, and the Court thereupon declared that a nuisance, under the Act, is defined thus:

> "An room, house, building, boat, vehicle, structure, or place where intoxicating liquor is

> manufactured, sold, *kept* or bartered in violation of this title, and all intoxicating liquor and property kept and used in maintaining the same, is hereby declared to be a common nuisance."

The quotation is the exact phraseology of Section 21 of Title II of the "National Prohibition Act" in which a nuisance is defined. We are unable to understand how any possible objection can be taken to the very language of the Section under which plaintiff in error was prosecuted, or why it could have been improper in any event for the Court to declare to the jury the language of the Section in question. Indeed, the very authority cited by counsel in support of his objection is this very section. He claims, however, that the liquor must not only be kept therein but it must be kept "for sale or barter or other commercial purposes," but the provision of the law is otherwise. It is said to be unlawful to keep the liquor "in violation of this Title." If there could be no violation of the Title other than keeping it for commercial purposes, the phraseology would be equivalent and either phrase could be indifferently used. It is said also that the liquor must be fit for use for beverage purposes, but the Section uses the words "intoxicating liquor" and counsel did not request any further elucidation of the phrase.

There is absolutely nothing in the language complained of which supports the further objection of counsel that the Court instructed the jury that in-

toxicating liquor was *maintained* on the premises or whereby the Court undertook to pass upon any question of fact. Indeed the Court carefully told the jury that questions of fact were solely within their competence.

Another objection to the charge urged by counsel on page 29 of his brief seems to be that in stating to the jury the rule found in Section 33 of the Act, providing that possession of liquor by a person not legally permitted to possess it is *prima facie* evidence, etc., the Court in fact told the jury that it was conclusive evidence of such fact, but a mere reading of the language used by the Court shows that this objection is unfounded. The Court nowhere made use of the word "conclusive," nor did it in any manner use any language having any such effect. It properly referred to the Section of the Act and quoted it literally, thereby telling the jury that in a certain event certain things would be *prima facie* evidence. It was not error to quote the very language of the Act which provided a rule of evidence for the consideration of the very type of case being tried; the quotation was accurate and no further instruction was requested by defendant, nor was it improper to declare to the jury that it would have been a violation of the law on the part of Traversi if he was doing, as he claimed, that is, taking the liquor out to have his lunch. The government claimed that he had no such purpose, and it was proper for the jury to consider in solving the issue

that such purpose would have been a violation of the law.

Further objection is made to the instruction of the Court regarding the second count as to what amounts to possession. We are really unable to understand how the language complained of is in any respect erroneous, although as we have stated before, the second count may be eliminated from consideration.

We have thus referred to the charge of the Court with the design of showing that it was correct, but we, nevertheless invoke the well established rule of law that the Court will not consider objections to the charge of the Court where the charge is not excepted to.

We call the attention of the Court to the observations of the Supreme Court of the United States on this question in the case of

ALLIS vs. UNITED STATES, 155 U. S. 117, 123; 39 L. Ed. 91, 93;

The objections to the charge now taken are really verbal criticisms or objections as to the Court's action in failing to give fuller instructions upon some points as to which plaintiff in error failed to request anything further. It is eminently a case for the application of the salutary rule declared in the Allis case.

In conclusion we submit that the plaintiff in error was proven to be guilty of a violation of the law, and that his rights were not violated in any respect, and that the judgment of the Court should be affirmed.

Respectfully submitted,

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